IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

MAR 17 1975
MICHAEL RODAK, JR., CLERK

No. 74-1176

JOHN W. BRUBAKER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CLARA BRUBAKER, AND RONALD K. SIEVERT, AN INDIVIDUAL,

Petitioners,

vs.

BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE, JAMES R. ALBERT, WALTER PAGELS, PAUL C. JONES, JR., KENNETH WILKINSON, JOHN CONDON, BEN DUNKLEY, WILLIAM H. FULLRIEDE, JOHN R. HOLLAND AND JACQUELINE MILLER, EACH INDIVIDUALLY AND AS MEMBERS OR AGENTS OF THE BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX.

ALLEN H. GERSTEIN,
Two First National Plaza,
Chicago, Illinois 60603,
MICHAEL P. BUCKLO,
One IBM Plaza,
Chicago, Illinois 60611,
HOWARD EGLIT,
Roger Baldwin Foundation of ACLU, Inc.,
5 South Wabash Street,
Room 1516,
Chicago, Illinois 60603,
MELVIN L. WULF,
American Civil Liberties Union Foundation,
22 East 40th Street,
New York, New York,

Attorneys for Petitioners.

Gunthorp-Warren Printing Company, Chicago • 346-1717

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX.

Petitioners pray that a writ of certiorari issue to review the *en banc* order of the United States Court of Appeals for the Seventh Circuit entered December 17, 1974.

OPINIONS BELOW.

The *en banc* order of the Seventh Circuit with respect to which review is sought has not yet been reported. It is printed in the Appendix hereto at A55.

The district court's opinion and order from which appeal was taken and which was affirmed by the *en banc* order of the Seventh Circuit is not reported. It also is printed in the Appendix hereto at A9.

The opinion of the Seventh Circuit with respect to which the *en banc* rehearing was granted and which became *functus officio* by virtue of the above-mentioned *en banc* order of the Seventh Circuit is reported at 502 F. 2d 973 and is reproduced in the Appendix hereto at A13.

An earlier opinion and order of the district court, which is not involved in the review sought here, is not reported. However, for completeness it is reproduced in the Appendix hereto at A1.

JURISDICTION.

Jurisdiction is based on 28 U. S. C. Section 1254(1). The *en banc* order sought to be reviewed was entered on December 17, 1974.

QUESTIONS PRESENTED.

1. May the First Amendment rights of public school teachers, as exercised in the course of their classroom instruction, be negated by virtue of their dismissals where the standard enunciated by the reviewing court to measure the legality of the dismissals is solely that the dismissals must be upheld unless "arbitrary and capricious", and which specifically (1) ignores the First Amendment interests claimed; (2) imposes no burden upon the school authorities to justify their interference with the First Amendment rights of the teachers; (3) upholds the dis-

missals unless it cannot be said that "all reasonable men" would find the speech suitable; (4) leaves undefined the word "suitable"; (5) employs a reasonable man test as a constitutional standard; and (6) requires a unanimity of reasonable men to disavow, rather than uphold, censorship?

2. May the First Amendment rights of public school teachers, as exercised in the course of their classroom instruction, be negated by virtue of their dismissals without any burden being imposed upon the school authorities to justify that censorship and the dismissals resulting therefrom?

3. Is a standard of arbitrariness and capriciousness applicable as the sole measure of the constitutionality of dismissals of public school teachers for the exercise of rights protected by the First Amendment?

4. May the First Amendment rights of public school teachers, as exercised in the course of their classroom instruction, be negated by virtue of their dismissals where the standard enunciated by the reviewing court to measure the legality of the dismissals requires that "all reasonable men" disavow the censorship that resulted in the dismissals in question?

5. May the First Amendment rights of public school teachers, as exercised in the course of their classroom instruction, be negated by virtue of their dismissals where the standard enunciated by the reviewing court to measure the legality of the dismissals fails to define the test of "suitability" applied to the speech in question?

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

Petitioners, three public school teachers employed under contract by respondent school board, were discharged without pay during the school term on May 4, 1970, for distributing to their eighth grade students a multi-color brochure dealing with the 1969 Woodstock music festival. A reproduction of the brochure is a part of the Court of Appeal's decision printed in the Appendix hereto at A47.

No standards or regulations had been promulgated by the School District to guide petitioners in judging whether these classroom activities were permissible. Shortly after their dismissals, petitioners, through counsel, requested a hearing which was denied by the school board.

On April 22, 1971, petitioners filed a complaint in the Northern District of Illinois charging respondent school board, its members and certain school administrators with violation of their First and Fourteenth Amendment rights, breach of contract and defamation of character. The complaint sought both equitable relief and damages.

On December 21, 1971, partial summary judgment was granted petitioners with respect to denial of procedural due process and respondents were ordered by the district court to provide a statement of reasons for the dismissals and provide a

public hearing at which petitioners could respond to those charges. (A1.)

On February 26, 1972, a hearing was provided by respondent school board at which the dismissals were reaffirmed after the introduction of testimony and exhibits by the parties including the testimony of two expert witnesses offered by petitioners. These experts lauded petitioners' teaching methods and the use of the brochure at issue. The school board grounded its reaffirmance of the dismissals on the basis that a poem, entitled "Getting Together" (A48), which was included in the brochure contained language of an obscene and suggestive nature and promoted or otherwise favorably portrayed the use of drugs.

On August 21, 1972, the district court granted respondents' motion for summary judgment dismissing the suit. An appeal was taken from this decision to the Court of Appeals for the Seventh Circuit which, in its opinion of July 31, 1974, affirmed the decision of the district court with one judge dissenting. (A13.)

A rehearing *en banc* was granted by the Court of Appeals and on December 17, 1974, it affirmed the judgment of the district court by an equally divided vote. (A55.) The July 13, 1974 opinion of the Court of Appeals was specifically ordered *functus officio* by virtue of the *en banc* order of December 17, 1974, and the decision of the district court now stands as the law of the case. (A56.) This petition follows in due course.

The constitutional issues involved in this petition were raised at each step of the proceedings below.

REASONS FOR GRANTING THE WRIT.

The constitutional rule established by the Court of Appeals in the present case effectively abolishes the First Amendment right of academic freedom in the classrooms of the Seventh Circuit. The court adopted this position notwithstanding the well-

recognized constitutional principle that teachers "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 506 (1969). Indeed, this Court emphasized in *Shelton* v. *Tucker*, 364 U. S. 479, 481 (1960), that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." See also, *Papish* v. *Board of Curators*, 410 U. S. 667 (1973); *Epperson* v. *Arkansas*, 393 U. S. 597 (1968).

Academic freedom rights and the First Amendment are virtually synonymous, and these rights occupy a primacy which must be accorded the most stringent constitutional protection. This is true no matter whether the setting is the college, high school or elementary school. *Epperson* v. *Arkansas*, *supra; James* v. *Board of Educ.*, 461 F. 2d 566 (2d Cir. 1972); *Albaum* v. *Carey*, 283 F. Supp. 3, 10-11 (E. D. N. Y. 1968). Specifically regarding the special place occupied by academic freedom within the educational process, this Court stated in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967):

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."

The vigilant protection of the right of academic freedom is especially important in that any invasion of this right invariably has a chilling effect upon its exercise, not only by those teachers directly involved, but upon all other teachers in the academic community as well. *Wieman* v. *Updegraff*, 344 U. S. 183, 194-95 (1952) (Frankfurter, J., concurring).

The ruling of the Seventh Circuit Court of Appeals in this case succeeds in completely ignoring the dictates of the decisions of this Court and the First Amendment right of academic free-

dom which those decisions uphold. The constitutional standard adopted by the court, in this critical confrontation between the First Amendment and attempted governmental censorship, simply leaves no breathing room for free speech and academic freedom for teachers within the classroom.

In affirming the decision of the district court *en banc* by an equally divided vote (which perhaps indicates the court's own discomfort with its holding), the Court of Appeals established as a rule of law a standard which combines a variety of elements, each of which alone assaults the First Amendment, and which together have a devastating impact upon the right of academic freedom within the classroom.

In its opinion, the district court observed that petitioners had admitted distributing to their students a brochure concerning the "Woodstock" festival which included a poem that the court, without explanation, viewed as containing "profane words and favorable references to drugs." The court then proceeded to apply what it termed a standard of arbitrariness and capriciousness in measuring the legality of petitioners' dismissals and concluded that "if the distribution of the brochure is a basis for discharge which is not wholly without reason, there exists in the instant case a basis for discharge which is not wholly unsupported in fact." (A10-11.)

In arriving at its final conclusion that the basis for discharge was not "wholly without reason," the court enunciated a melange of inappropriate standards which do violence to petitioners' First Amendment rights:

> The brochure contains a poem entitled "Getting Together" which contains profane words and favorable references to drugs; this Court cannot say that all reasonable men would find that this poem was suitable reading material for elementary school children.
>
> Accordingly, this Court holds that there was a basis for discharge of the plaintiffs which was not wholly unsupported in fact or wholly without reason. (A11.)

In its opinion the court totally ignored the First Amendment interests at issue. The court invoked an unexplained standard of "suitability" which is unsustained by any authority. The court adopted a standard which requires the unanimity of *all* reasonable men to disavow, rather than uphold, governmental censorship: presumably, if just one reasonable man could be found under the court's test who deems the material unsuitable, there exists a sufficient basis for banning the material from the classroom and firing the teachers who utilized it in the course of their classroom instruction. Thus, constitutional rights within the traditional arena of thought and exchange of ideas are to be governed by a test akin to a tort law standard, but even more restrictive in that it requires the *unanimity* of reasonable men to allow fundamental First Amendment rights to survive. On each of these different bases, the lower court employed an analysis repugnant to free speech and academic freedom under the First Amendment.

Furthermore, even in the simple—albeit critical—mechanics of the censorship process, the court ignored the clear mandate of the Constitution that when First Amendment expression is at issue, the government must bear a heavy burden to sustain its actions. *Healy* v. *James*, 408 U. S. 169, 184 (1972); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *James* v. *Board of Educ., supra.* However, in the present case, rather than shifting the burden to the school board to justify the restriction of petitioners' First Amendment rights as this Court required in the analogous decision of *Tinker* v. *Des Moines School Dist., supra,* the district court employed an analysis whereby the school authorities bear no burden to demonstrate the justification for their action.

The district court reached this conclusion despite the fact that the school board offered no evidence that petitioners' actions threatened to impair any legitimate interest it may have in regu-

lating school curriculum. The district court further reached its conclusion despite the fact that petitioners' expert witnesses testified that the teaching methods in question were well within professional standards of responsibility and that the allegedly obscene and favorable drug references in the poem would have an exceedingly trivial effect upon the students involved and would not present material to which they had not been repeatedly exposed in their everyday experiences.

Fortunately, other courts of appeals have found more persuasive merit in the First Amendment's protection of academic freedom. For example, in a decision directly in conflict with the present holding, the Court of Appeals for the First Circuit held in *Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F. 2d 1242 (1st Cir. 1971), that sanctions were not permissible when it is shown that the conduct of the teacher is "within standards responsibly, although not universally, recognized and that he acted in good faith and without notice that . . . [the] defendants, as his superiors, were not of that view."

It is submitted that under the standards applied by the district court—and adopted by the Court of Appeals—few, if any, teachers would prevail in attempting to protect their legitimate academic freedom rights. The chilling effect that this decision, now the law of the Seventh Circuit, will have upon the creative initiative of teachers in struggling to reach and open the minds of their students to the educational process is all too obvious. Those teachers who stick solely to recitation from textbooks provided them will survive. Those teachers who dare to vary from the four corners of the prescribed textbook, when they believe that such an excursion will help to capture the interest of and intellectually stimulate their students, will be subject to summary dismissal without justification by an offended school board even though the preponderant opinion of the teaching profession would regard the teacher's action as being admirable. Encouragement of this "pall of orthodoxy over the classroom" should not be tolerated by this Court.

If the traditional intellectual marketplace of the classroom, fed by the expertise and professional judgment of those trained to arouse, stimulate and help guide the minds of schoolchildren is to be resurrected in the classrooms of Illinois, Indiana and Wisconsin, it must be by this Court's reversal of the decision below of the Seventh Circuit.

CONCLUSION.

For the foregoing reasons, it is urged that a Writ of Certiorari be granted to review the decision below.

Respectfully submitted,

ALLEN H. GERSTEIN,
Two First National Plaza,
Chicago, Illinois 60603,

MICHAEL P. BUCKLO,
One IBM Plaza,
Chicago, Illinois 60611,

HOWARD EGLIT,
Roger Baldwin Foundation of ACLU, Inc.,
5 South Wabash Street,
Room 1516,
Chicago, Illinois 60603,

MELVIN L. WULF,
American Civil Liberties Union Foundation,
22 East 40th Street,
New York, New York,
Attorneys for Petitioners.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

CLARA S. BRUBAKER, JOHN W. BRUBAKER and RONALD K. SIEVERT, each as individuals,
Plaintiffs,
vs.
BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, County of Cook, State of Illinois, a body politic and corporate, JAMES R. ALBERT, WALTER PAGELS, PAUL C. JONES, JR., KENNETH WILKINSON, JOHN CONDON, BEN DUNKLEY, WILLIAM H. FULLRIEDE, JOHN R. HOLLAND and JACQUELINE MILLER, each individually and as members or agents of the Board of Education, School District No. 149, County of Cook, State of Illinois, a body politic and corporate,
Defendants.

No. 71 C 971

MEMORANDUM OPINION AND ORDER.

This cause comes on plaintiffs' motion for entry of a summary judgment in plaintiffs' favor for the relief demanded in Counts I and II of the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Most of the facts in this case are uncontroverted. Plaintiffs, Clara S. Brubaker, John W. Brubaker and Ronald K. Sievert, were teachers in defendant School District No. 149 prior to the activity that purportedly led to their dismissal. Mrs. Brubaker taught French in a number of schools in the District; Mr. Brubaker and Sievert taught Industrial Arts and Language Arts respectively at the Everett McKinley Dirksen Junior High School in the District.

All of the plaintiffs were employed under contract with the defendant School Board for the 1969-1970 school year. None of the plaintiffs had acquired tenure. Prior to the activity which led to their dismissals, Sievert had been notified that he would be retained for the 1970-71 school year while the Brubakers had been informed that they would not be retained.

In mid-April, 1970, while attending the movie "Woodstock", Mrs. Brubaker and another teacher not a party to this action acquired copies of a multi-page brochure (hereinafter referred to as the "Woodstock brochure") bearing the inscription "WLS RADIO CHICAGO-abc [American Broadcasting Company]". The Woodstock brochure consists of eight pages and includes approximately 21 articles and poems and 23 pictures with captions. All of the articles, poems and pictures deal with the 1969 rock festival at Bethel, New York, now commonly referred to as "Woodstock".

Shortly after acquiring the brochures, Mrs. Brubaker gave a number of them to Mr. Brubaker and Sievert who thought they would be of interest to their students. Mrs. Brubaker placed a number of the brochures in the teachers' lounges at the various schools where she taught French. Mr. Brubaker and Sievert placed copies on their desks in their classrooms for dissemination among interested students. These brochures were taken by several students ranging in age from 11 to 13 years. Apparently, certain parents became aware of the Woodstock brochure. Complaints about the brochure in general and about a certain poem contained therein entitled "Getting Together" in particular were

made to the President of the School Board, defendant John Condon.

Defendant Doctor James Albert, superintendent of School District No. 149, inquired of the Brubakers and Sievert as to whether or not they had distributed the brochure and upon receiving an affirmative answer, reported his findings to the School Board at a meeting held on April 30, 1970. The matter was discussed in "executive session" (closed to the public). The School Board did not invite any of the plaintiffs to attend and explain the circumstances surrounding the distribution of the brochure.

In an executive session held on May 1, 1970, the School Board agreed to dismiss plaintiffs immediately without payment of the salary that would have been due plaintiffs had they completed the school year. The following formal resolution was adopted in open session:

> Resolve [sic] that [name of individual plaintiff] be dismissed as a teacher of the District effective May 4, 1970 for making available to students of the District certain promotional material entitled "Woodstock" which material is of an obscene and suggestive nature, promotes a viewpoint contrary to the requirements of the laws of the State in regard to teaching about the harmful effects of alcoholic drinks and narcotics, and was distributed contrary to the provisions of policy 3547 of the Policies and By-Laws of School District 149, Cook County, Illinois, prohibiting the distribution within the schools or on school property of any material other than material purchased, procurred [sic] or furnished under the initiative and with the approval of the Board of Education of the District for distribution and use in its Educational Program.
>
> Be It Further Resolved that the secretary of the Board be authorized and directed to prepare a letter to the teacher notifying him [or her] of this action and that the Superintendent be authorized and directed to deliver said letter to the teacher in person as soon as convenient.

Letters of dismissal were handed to the plaintiffs on May 4, 1970. Shortly thereafter, plaintiffs, through counsel, requested a hearing, but the School Board denied the request.

Count I of the complaint deals with alleged violations of the first and fourteenth amendments to the United States Constitution. Redress for deprivation of rights secured by these constitutional provisions is alleged to be provided by Section 1 of the Ku Klux Act of April 20, 1871, 42 U. S. C. A. § 1983. Count II deals with alleged breaches of the employment contracts.

Federal jurisdiction is invoked under 28 U. S. C. § 1343 as for Count I, and pendent jurisdiction and diversity of citizenship, 28 U. S. C. § 1332, as for Count II. Mr. Brubaker and Sievert presently reside in Indiana and Colorado respectively while Mrs. Brubaker has died during the course of this litigation. This motion is not concerned with Count III of the complaint which alleges a cause of action for defamation.

The two Counts involved in this motion will be treated separately.

COUNT I.

Count I of the complaint can be divided into two logical parts: (1) Defendants' alleged denial of the plaintiffs' *procedural* due process rights and (2) defendants' alleged denial of the plaintiffs' *substantive* due process rights. These allegations will be treated separately.

A. Denial of Procedural Due Process.

In *Roth* v. *Board of Regents*, 446 F. 2d 806 (7th Cir. 1971), the Seventh Circuit Court of Appeals affirmed a district court's ruling that a non-tenured professor at a state university was entitled to a hearing concerning the reasons for his discharge. The Court stated:

> Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and

> others with a background of controversy and unwelcome expression of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights. 446 F. 2d at 810 [footnotes omitted].

The district court in *Roth* ordered the defendants to deliver a statement of the reasons why the plaintiff had not been retained and to provide a hearing at which he could respond to such reasons or, in the alternative, to offer a contract to the plaintiff for the ensuing school year.

The first important question this Court must decide is whether or not the *Roth* decision is applicable to the facts in the instant case. Defendants' suggestion

> that it is premature to conclude at this time that the *Roth* decision is the ruling case law on the subject since the Supreme Court granted certiorari in the case on October 26, 1971. (40 U. S. Law Week 3194)

is without merit. It is well settled that the denial of the writ of certiorari imports no expression of opinion by the Supreme Court on the merits of the case, *Pan American Petroleum Corp.* v. *Federal Power Comm'n,* 352 F. 2d 241, 243 (10th Cir. 1965), and it should be obvious that the converse holds true; the granting of the writ imports no expression of opinion by the Supreme Court on the merits of the case. Therefore, this Court will consider itself bound to follow the Seventh Circuit's decision in *Roth* until such time as the decision is overruled.

Defendant has put forth no reasons why the facts in *Roth* should be distinguished from the facts in the instant case and it appears to this Court that no logical reason for distinction exists. Therefore, this Court will issue the same order issued by the district court in *Roth.* Defendants must provide plaintiffs with a statement of reasons for their discharge and must provide a public hearing at which the plaintiffs can respond to such reasons or, in the alternative, defendants must offer plaintiffs a new contract of employment. Plaintiffs are not entitled

to automatic reinstatement as they request because such an order would completely overlook the possibility that there might have been justification for the dismissal on substantive grounds.

B. Denial of Substantive Due Process.

Plaintiffs allege that they were denied substantive due process because (1) there existed a lack of ascertainable standards by which they could measure their conduct and (2) because the defendant Board's decision to dismiss was arbitrary and capricious.

In support of their contention that no ascertainable standards existed, the plaintiffs cite the following language from *Parducci* v. *Rutland*, 136 F. Supp. 353, 357 (M. D. Ala. 1970):

> In the case now before the Court, we are concerned not merely with vague standards, but with a total absence of standards. When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom. [footnotes omitted]

A document entitled School District Policy 3547 governs school policy regarding the distribution of unapproved material. Plaintiffs deny they have ever been shown such a document; defendants claim the plaintiffs have been shown it. Thus, a question of fact exists which is material to a determination as to whether or not ascertainable standards were in existence. Furthermore, defendants assert there are two more sources for ascertainable standards: One is the mandate contained in Section 27-10 of the Illinois School Code, Ill. Rev. Stat. 1969, ch. 122, § 27-10. requiring school authorities to provide instruction on the nature of alcoholic drinks and other narcotics and their effects on the human system, and the other is the

"proprieties" described in *Mailloux* v. *Kiley*, 436 F. 2d 565 (1st Cir. 1971).

> The court in no way regrets its decision in Keefe v. Geanakos, 1 Cir., 1969, 418 F. 2d 359, but it did not intend thereby to do away with what, to use an old-fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. 436 F. 2d at 566.

Therefore, two material questions of fact exist regarding the alleged absence of ascertainable standards: Whether the plaintiffs viewed School Policy 3547 prior to distributing the Woodstock brochure and whether ascertainable standards other than School Policy 3547 are applicable.

The plaintiffs contend that the defendant Board's decision to dismiss was arbitrary and capricious because

> no evidence was received by the defendants as to the good faith of plaintiffs in distributing the brochure.

This complaint is cured by this Court's order of a statement of reasons and a hearing. At the hearing, plaintiffs can respond and present evidence of their good faith. Further, plaintiffs can present evidence as to whether or not the brochure distributed is obscene or suggestive. If plaintiffs are denied reinstatement after this hearing, it will be time enough for this Court to consider anew whether or not the discharge was arbitrary and capricious. At this stage, it suffices to say that it is the Court's opinion that all reasonable men would not agree that the discharge was arbitrary and capricious and, accordingly, that the part of plaintiffs' motion for summary judgment relating to the alleged violations of plainitffs' substantive due process rights is denied.

COUNT II.

Although plaintiffs' motion for summary judgment requests the relief demanded in Count II, neither party has presented legal argument as to why summary judgment should or should not be granted. Since the burden of persuasion is on the movant, this Court will deny the motion for summary judgment for the plaintiffs on Count II.

Accordingly, it is hereby adjudged, ordered and decreed that:

(1) Defendants must provide a statement of reasons for the dismissal of plaintiffs to plaintiffs' attorneys within 30 days and must provide a public hearing at which plaintiffs can respond to such reasons for dismissal within 60 days, or, in the alternative, defendants must offer an employment contract to the plaintiffs for the present school year;

(2) Plaintiffs' motion for summary judgment is denied for all other relief than that set forth in paragraph (1) of this order.

Dated: December 21, 1971

ENTER:

/s/ WILLIAM J. BAUER,

Judge.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CLARA S. BRUBAKER, ET AL.,
Plaintiffs,
vs.
BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, County of Cook, State of Illinois, a body politic and corporate, et al.,
Defendants.

No. 71 C 971

MEMORANDUM OPINION AND ORDER.

This cause comes on cross-motions for summary judgment made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The uncontroverted facts in this case were set out in considerable detail in an opinion and order issued by this Court on December 21, 1971. Briefly, the plaintiffs were discharged from their employment as non-tenured elementary school teachers on May 4, 1970, after they had distributed a certain brochure about the movie "Woodstock" in their school. Their request for a hearing on the terminations before the Board of Education was denied and the instant suit followed.

In the opinion and order issued on December 21, 1971, this Court, relying upon *Roth* v. *Board of Regents*, 446 F. 2d 806 (7th Cir. 1971), held that plaintiffs had been denied procedural due process in that they had not been given notice and a hearing prior to their discharge. Accordingly, this Court ordered the defendant Board of Education to provide a statement of reasons for plaintiffs' dismissals and a public hearing at which the plain-

tiffs could respond to such reasons or, in the alternative, to offer an employment contract to the plaintiffs for the following school year.

Pursuant to the above order, the Board of Education supplied written reasons for the discharge to plaintiffs and on February 26, 1972, a public hearing was commenced with members of the Board of Education sitting as the hearing body. During this hearing, both sides had an opportunity to present witnesses and cross-examine opposing witnesses. The Board later resolved "that each of the reasons for the dismissal of the teachers served upon them on January 14, 1972 . . . has been sustained by the evidence" and upheld plaintiffs' terminations.

In their original motion for summary judgment, plaintiffs contended that they had been denied procedural and substantive due process. The alleged denial of procedural due process was premised upon the denial of notice and a hearing; the alleged denial of substantive due process was premised upon the allegation that the dismissals were arbitrary and capricious. In its opinion of December 21, 1971, the Court, concerned mainly with the alleged denial of procedural due process, stated:

> If plaintiffs are denied reinstatement after this hearing, it will be time enough for this Court to consider anew whether or not the discharge was arbitrary and capricious.

Since the date of that opinion, the notice has been provided, the hearing has been held and the plaintiffs have been denied reinstatement. Thus, it is time for this Court to consider whether the discharge was arbitrary and capricious.[1]

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1. It should be noted that plaintiffs, for the first time, now urge this Court to hold that procedural due process requires a hearing before an impartial board. The Court notes that no such contention was made in plaintiffs' previous motion for summary judgment or at the hearing itself. Furthermore, the United States Court of Appeals for the Seventh Circuit has held that a hearing on the discharge of a non-tenured teacher may properly be held before a school board, *Shirk* v. *Thomas*, 447 F. 2d 1025 (7th Cir. 1971).

Because the notice and hearing are already a *fait accompli*, this Court will not discuss that effect the Supreme Court's reversal of the *Roth* case, 40 U. S. L. W. 5079 (June 29, 1972), would originally have had on the instant case.

This Court must first determine what its scope of review is over the Board's decision to discharge the plaintiffs. In the district court's decision in the *Roth* case, Judge Doyle stated:

> [T]he decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact or on a basis wholly without reason. 310 F. Supp. at 979.

The *Roth* scope of review was adopted in *Drown* v. *Portsmouth School District*, 451 F. 2d 1106, 1108 (1st Cir. 1971) and this Court adopts it in the instant case.

The question presented to this Court by the instant motion, therefore, is as follows: Have the plaintiffs herein been discharged for a basis wholly unsupported in fact or for a basis wholly without reason?

The plaintiffs admit that they either brought to or distributed in school the "Woodstock" brochure. Thus, if the distribution of the brochure is a basis for discharge which is not wholly without reason, there exists in the instate case a basis for discharge which is not wholly unsupported in fact.

It is this Court's opinion that the distribution of the brochure is a basis for discharge that is not wholly without reason.[2] The brochure contains poem entitled "Getting Together" which contains profane words and favorable references to drugs; this Court cannot say that all reasonable men would find that this poem was suitable reading material for elementary school children.

Accordingly, this Court holds that there was a basis for discharge of the plaintiffs which was not wholly unsupported in fact or wholly without reason.

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2. At this stage, this Court would like to bring home a point which should be obvious. This Court has no jurisdiction to decide whether or not a particular punishment handed down by a Board of Education was appropriate for a particular offense. All this Court can do is determine whether there was any basis for punishment or censure at all. If there was, this Court's inquiry must end.

Accordingly, it is hereby ordered, adjudged and decreed that:

(a) Plaintiffs' motion for summary judgment is denied; and

(b) Defendants' motion for summary judgment is granted.

Dated: August 21, 1972

ENTER:

/s/ WILLIAM J. BAUER,
Judge.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 72-1898

CLARA S. BRUBAKER, JOHN W. BRUBAKER and RONALD K. SIEVERT, as individuals,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION, SCHOOL DISTRICT 149 Cook County, Illinois, a body politic and corporate; JAMES R. ALBERT, WALTER PAGELS, PAUL C. JONES, JR., KENNETH WILKINSON, JOHN CONDON, BEN DUNKLEY, and JACQUELINE MILLER, individually, and as members or agents of Board of Education of School District 149, Cook County, Illinois,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

71-C-971

WILLIAM J. BAUER, *Judge.*

Heard September 24, 1973—Decided July 31, 1974

Before KNOCH, *Senior Circuit Judge,* O'SULLIVAN, *Senior Circuit Judge,** and FAIRCHILD, *Circuit Judge.*

O'SULLIVAN, *Senior Circuit Judge.* This appeal concerns the discharge by defendant Board of Education of three public school teachers—plaintiff-appellants—for distributing or causing to be distributed to their eighth grade pupils allegedly ob-

* Honorable Clifford O'Sullivan of the Sixth Circuit, sitting by designation.

scene and improper reading materials. Action was brought against the appellees, Board of Education, its members and agents, in the United States District Court for the Northern District of Illinois, Eastern Division. For their cause of action, plaintiffs charged that defendants' action abridged their civil rights secured to them by 42 U. S. C. § 1983, and their rights under the First and Fourteenth Amendments. Jurisdiction of the Court was based upon 28 U. S. C. §§ 1332 and 1343(3) and (4). The litigation was concluded in the District Court by an order granting defendant-appellees' motion for summary judgment. From such order, plaintiffs appeal.

We affirm.

Clara S. Brubaker, John W. Brubaker and Ronald K. Sievert were teachers of eighth grade students in public schools operated by the Board of Education of District 149, Cook County, Illinois. They were all non-tenured, and their respective one-year contracts were to expire on June 12, 1970. Prior to the events here involved, the Brubakers had been advised that they would not be rehired, while Sievert had been notified that he would be retained for the 1970-71 school year.

In April, 1970, Clara Brubaker and another teacher, not involved here, attended the movie "Woodstock" which documented the 1969 rock festival by the same name. A number of relevant brochures were acquired at the theatre. These contained various articles, poems and pictures. One article—or poem—entitled "Getting Together" contained material which brought about the discharge of the plaintiffs. Its total content is set out in the brochure "Woodstock" a copy of which is made an appendix hereto. Those parts relating to drugs, sexual behavior and what might be called vulgarities are as follows:

> "Woodstock felt like home. *A place to take acid. A place to make love.* Felt a little like a place we'd been before, but hard to remember, like yesterday's vision, like last night's dream. But now it's all now, *and it feels like we're never turning back.*
>
> * * * * *

Woodstock felt like a swell of energy, wave of elation that fills the heart *and flows on over the lover beside you.*

Woodstock was freedom. Don't ever forget that. Don't ever settle for less.

* * * * *

Oh joy overflowing, *oh lover caressing,* I am what I have to share, oh take me completely!

* * * * *

Grass smoked together.[1]

Stink of our shit; music of laughter.

Gathering together.

Bodies naked into the water, touching each other, opening hearts into greater awareness of being together

of living on the planet

of being part of something—a movement, a motion, like a drop of water in the crest of the tide, moving together *we're a big fucking wave . . . !*

* * * * *

Its only the beginning.

* * * * *

Old world crumbling, new world being born."

(Emphasis supplied.)

As a message to the minds of eighth graders, the brochure's poetry can and probably must be fairly read as an alluring invitation and a beckoning for them to throw off the dull disciplines imposed on them by the moral environment of their home life, and in exchange to enter into a new world of love and freedom —freedom to use acid and grass, freedom to take their clothes off and to get an early start in the use of such vulgarities as "shit," "fucking," and their companions.

It is probably a fair inference that by second or third year high school most American males have become familiar with, and at times employ, these and like words. Is it only a forlorn hope, that most of our young ladies will never employ that kind of speech?

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1. Acid and Grass are words popularly employed to identify LSD and marijuana, respectively.

Clara Brubaker, who taught French at various primary grade schools, placed some of these brochures in the teachers' lounges and also gave copies to her husband, John Brubaker, and to Ronald Sievert, allegedly for use in their classes. She did not herself distribute any brochures to students, but did display one of the brochure's posters in her classroom.

Copies of the brocheure were then made available to the eighth grade students in John Brubaker's and Ronald Sievert's classes. In due time, these brochures found their way into the homes of some of the students. When parents complained to the principal, appellee John Condon, (especially about the poem "Getting Together"), appellants were asked by Superintendent James R. Albert whether they had made copies of the brochure available to the students. He was told that appellants had done so, and Albert reported his findings to the appellee Board of Education members at a closed session on April 30, 1970. The next day the Board resolved to dismiss appellants as of May 4, 1970. Each teacher received a letter advising of the Board's adoption of the following Resolution:

> "Resolve that [teacher's name] be dismissed as a teacher of the District effective May 4, 1970 for circulating within the schools of the District certain promotional material entitled "Woodstock" which material is of an obscene and suggestive nature, promotes a viewpoint contrary to the requirements of the laws of the State in regard to teaching about the harmful effects of alcoholic drinks and narcotics, and was distributed contrary to the provisions of policy 3547 of the Policies and By-Laws of School District 149, Cook County, Illinois, prohibiting the distribution within the schools or on school property of any material other than material purchased, procurred [sic] or furnished under the initiative and with the approval of the Board of Education of the District for distribution and use in its Educational Program.[2]

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2. The school board's Policy 3547 reads:

"No material of any kind, whether or not bearing the imprint of a profit making organization, may be distributed by such organization, or any agent thereof, or any district employee, to

> "Be It Further Resolved that the secretary of the Board be authorized and directed to prepare a letter to the teacher notifying him [or her] of this action and that the Superintendent be authorized and directed to deliver said letter to the teacher in person as soon as convenient."

Before the effective date of discharge, an attorney contacted the School District, asking for "the setting of a hearing date with regard to the charges pursuant to which they [plaintiffs] were dismissed." This request was reiterated in a letter of May 15, 1970, from a staff attorney for the American Civil Liberties Union to the School District's attorney. The letter concluded:

> "I also hereby demand a written bill of particulars, a list of witnesses who may or may not be called to testify on behalf of the school board, and copies of any written statements heretofore made by such witnesses in writing or made orally and committed to writing."

In this letter, plaintiffs' attorney also observed:

> "There is a recent case, *Roth* v. *Board of Regents*, decided on March 9, 1970 in the federal court district for the Western District of Wisconsin, which, I am told, summarizes the procedural requirements for dismissal of non-tenured university professors at state institutions. However, I have not had time as yet to track down that opinion. Of course, it is our position that the same procedural due process standards apply to teachers in the public school system as to teachers in the public university system."

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students of the public school of this district, within the school, on school property, or at any district sponsored operation or function.

"No material of any kind, supplied by any non-profit organization may be distributed by such organization, or any agent thereof, or any district employee, until the Superintendent of Schools has approved such distribution. The Superintendent's decision shall be based on his judgment of the educational interests served in each individual case. Such decision will be reported to the Board of Education as informational items in its agenda."

Appellants Brubaker and Sievert testified that they were not aware of such policy. The Board was unable to prove the contrary.

On May 28, 1970, the School District attorney replied that the Board had considered plaintiffs' request but declined to grant such a hearing. No further action was taken, nor address made to the School Board for about a year, and then on April 22, 1971, this lawsuit was started. The District Court decision of *Roth* v. *Board of Regents,* 310 F. Supp. 972 (W. D. Wisc. 1970) referred to in counsel for plaintiff's letter of May 15, 1970, was then pending on appeal in this Court.

In their complaint, appellants charged that appellees had abridged their First and Fourteenth Amendment freedoms and their civil rights and in addition had breached their contracts and defamed them. Appellants each sought reinstatement, together with an award of back salary and compensatory and punitive damages for willful defamation in the amount of $200,000 each. An award of attorney fees was also sought.[3]

The complaint set out that Clara Brubaker had placed a number of the brochures in the teacher's lounges at four or five schools where she taught French, gave a number of copies to plaintiffs John Brubaker and Ronald K. Sievert, and "display[ed] the poster contained therein [in the brochure] in her classroom." She made no allegation that the brochure or its contents were in any way relevant to what she was teaching. It was further alleged that plaintiffs John Brubaker and Ronald K. Sievert had placed the brochures on their desks to be available to their students.

Appellants claim that the brochure had relevancy to what was being taught to the eighth grade students. Appellant Sievert said it had relevancy to his teaching assignment—Language Arts—because under his guidance his class was

3. The conclusion of their brief to this Court asks that:

"the case [be] remanded to the district court for entry of a judgment in favor of plaintiffs with respect to the violation of their constitutional rights and for the granting of a trial with respect to their claim of defamation of character."

studying the history of rock music. We are not advised what rock music has to do with Language Arts, but appellant Sievert testified:

> "We were to begin a new unit that day, but since we had just finished the other unit on the evolution of music I took out a brochure and I opened it up and instead of showing it I said, 'I have a brochure here which might be of interest to you because it seems to pertain specifically to what we just studied.'
>
> "And I said, 'It has a very colorful poster in it as well, which I think you may well be interested in,' and so I held up the poster part and got ooh's and ahh's from the class."
>
> * * * * *
>
> "So most of them were rather impressed, I think, by the colorful poster, and after showing this to them I said they could have one after the class period."
>
> * * * * *
>
> "Nobody took any until after the class period, when I said, 'Okay. Now you can come up and get the poster,' where they just rushed literally to the file cabinet and were just grabbing like crazy, trying to get as many as they could."

He testified that the brochure was not given to him by the school authorities; also that examination of it would quickly disclose that its material had not been prepared for classroom use.

He said that as to the poem "Getting Together" he felt that the young people could handle it quite well—"I was fearing mainly the reaction of parents and administrators."

Appellant John Brubaker's teaching assignment was solely "Industrial Arts." As to the relevancy of the Woodstock brochure to that subject, he said: "I think that this whole thing contributed to the interest of my class in musical instruments." He added that such would be true of the poetry also, saying that as to the words of the poem, "there was nothing wrong

with them * * * they were part of the regular vocabulary of youngsters of this age." Neither Brubaker nor Sievert explained to their students any claimed relevancy of the Woodstock brochure.

In due course appellees made a Motion to Dismiss the Complaint, averring that plaintiffs had no constitutional right to a hearing concerning the reasons for their discharge; that plaintiffs had admitted the misconduct which had brought on their discharge; that furnishing eighth grade students brochures containing the language set out above was not an activity protected by the First or Fourth Amendments or an exercise of civil rights; and that such material was without relevancy to the classes taught by plaintiffs. Appellees further contended that dismissal of plaintiffs was not a breach of their teaching contracts, that the truth of the alleged defamatory language had been admitted by plaintiffs, and that the allegedly defamatory statements were privileged.

This motion was denied by District Judge Hubert L. Will by order entered September 16, 1971, as follows:

> "Order defendants' motion to dismiss the complaint is denied. Order defendants to answer complaint within 10 days."

Following appellees' ordered answer, plaintiffs on November 22, 1971, moved for a summary judgment as to its claims of "Violation of 1st and 14th Amendments" (Count I of their complaint) and "Violations of the Employment Agreements" (Count II). On December 21, 1971, District Judge William J. Bauer, to whom the case had been transferred, and upon the authority of this Court's decision in *Roth* v. *Board of Regents*, 446 F. 2d 806 (7th Cir. 1971) (Reversed thereafter in 1972 by the Supreme Court, *Board of Regents* v. *Roth*, 408 U. S. 564), ordered the Board to provide appellants with a hearing and a statement of the reasons for their discharges.

The ordered hearings were held in early 1972 at which appellants were represented by counsel. Prior to such hearings each plaintiff was provided with a statement of the reasons for dismissal. The one given to John Brubaker included the following:

> "1. That on or about April 20, 1970 John Brubaker, while employed as an industrial arts teacher of School District 149, made available to students of the district a brochure entitled 'No one who was there will ever be the same' with the knowledge and intention that students would take and retain copies of the brochure for their personal reading and inspection.
>
> "2. That among the written material contained within said Woodstock brochure was a poem entitled Getting Together containing language of an obscene and suggestive nature and promoting or otherwise favorably portraying the use of drugs and other hallucinogens."

Reasons 3, 4 and 5 stated that the distributed brochure had not been approved for distribution and had not been prepared as a tool for school instruction; that appellants knew, or should have known, the contents of the brochure, and that Brubaker knew, or should have known, that:

> "[T]he patent purpose of the brochure was to publicize a motion picture about and recorded music from the 1969 rock music festival known as the Woodstock Festival which festival was widely reported in newspapers and on television and criticized for the purported sexual promiscuity and drug use of its participants, and also since the film promoted by said brochure had been assigned and advertised as having an R rating by its distributors which rating provided that persons under 17 years of age were not to be admitted unless accompanied by a parent or adult guardian."

Reasons 6 to 10 were as follows:

> "6. That the language of the poem Getting Together contained in said brochure promoted a viewpoint contrary to the requirements of the laws of the State of Illinois in

regard to teaching about the harmful effects of alcoholic drinks and narcotics as contained in Ill. Rev. Stat. 1969, ch. 122, § 27-10.

"7. That the language in the poem Getting Together was contradictory and counteractant to the generally accepted objective of discouraging the use of drugs and other hallucinogens by young persons.

"8. That the language of the poem Getting Together contained in the brochure violates what are called the proprieties or the standards of what is socially acceptable in conduct, behavior and speech, especially as between adult and elementary school age children.

"9 That making the poem Getting Together as a part of the brochure available to elementary school age children without comment or criticism served no legitimate educational objective and that the language of the poem is not consistent with generally approved and professionally acceptable classroom material or generally accepted educational standards and practices.

"10. That the language and subject matter of the poem Getting Together contained in the brochure had no relevance or in any way related to the courses of study which John Brubaker was assigned to present nor which he was, in fact, giving."

Those furnished Clara Brubaker and Ronald Sievert were of similar substance; the assigned reasons were substantially those originally given to appellants with notice of their dismissals.

At the relevant public hearings, testimony was presented by plaintiffs and by the Board. Plaintiffs produced two eminently educated men who expressed the view that the poem "Getting Together" was proper material to be given to eighth grade students. Both had received Ph.D's from important American Universities, and had studied and were currently active in the field of education.

The attention of these expert witnesses was called to the poem's reference to the apparent joys of smoking grass—mari-

juana—and its invitation to Woodstock as "a place to take acid"—LSD—and to make love. They knew of the transports and ectacies suggested by:

> "Oh joy overflowing, *Oh lover caressing* * * * Oh take me completely * * * *Grass smoked together. Stink of our shit;* music of laughter. * * * *Bodies naked* into the water, touching each other, opening hearts into greater awareness. * * * Of being part of something—a movement, a motion * * * moving together we're *a big fucking wave.*" (Emphasis supplied.)

Of the total work containing the above, one of such witnesses made the following comments:

> "For all its apparent looseness as to Whitman, it has quality, it's very tightly constructed, and it seems not too bad a poem."

Further:

> "I think there's a good deal of artistic imagination and integrity in that poem."

and, again,

> "It would be very hard, I think to suggest that any of it is there for shock value, for crude and gross shock value. He does get some shock value out of the literary contrast, but, *for my money, it shows a great awareness of the literary tradition, a great sensitivity of language,* to the development of English and American poetry." (Emphasis supplied.)

and:

> "You want a criticism, and I think myself that 'Oh lover caressing" is a little bit sentimental, but then you get from 'Oh lover caressing down to the 'Bodies naked into the water,' where he plays the romantic sentimentality against the—well, the realism of 'Bodies naked into the water' is an actual knowledge of each other, *the opening of hearts into greater awareness.*" (Emphasis supplied.)

* * * * *

> "I think the gentleness of this poem of lovemaking would be also of *very great educational value*. It might well have a considerable impression on them."

This same witness also considered the furnishing of the poem to the eighth grade children and stated that he thought the teaching methods of Brubaker and Sievert, employed in their Industrial Arts and Language Arts classes "are admirable." He expanded this compliment by observing:

> "It seems to me that they establish quite clearly that they had a good deal of sensitivity with the children and knew precisely what children are interested in."

He said of the words used in the poem that,

> "there are perhaps better words than seem to have been suggested, but I think that, you know, in a way, *these are sort of beautiful.*" (Emphasis supplied.)

When asked whether the distribution of the brochure *Woodstock* would fit the "preponderant" opinion of the teaching profession, he answered, "it is the kind of material that is in public circulation and is, therefore, part of the material of the classroom." He thought also that providing such material to the students would help to develop a "rapport with these students * * * as this all increases the general fluidity and realism of the classrooms."

One of the experts also expressed himself as follows:

> "[T]his is the real vision of the Woodstock thing, a whole notion of *a new sense of community* which I, for one, can deplore as having lost." (Emphasis supplied.)

This witness also testified as follows:

> "Q. I kind of get the feeling, Doctor, that what you are saying is that life is different really from what we adults and educators would like it to be and that we had better really attune our educational program to what it is really like as against what we prefer it to be.
>
> "A. If we are to serve the children instead of our own anxieties, yes, by all means."

Both of plaintiffs' experts disclosed current activities having to do with training the minds of today's children. One said he was,

> "Engaged in the activity of the schooling and service training of teachers, to a degree watching them work with children."

The other referred to his research for the National Institute of Child Health and Human Development. Thus the above quoted excerpts portray the attitudes and beliefs of some of the *teachers of the teachers* of today's children. It was their opinion that teachers should not be required to get approval from school authorities before distributing such material as the Woodstock brochure to their students. Such a requirement, it was said, "demeans the teacher" and would,

> "rigidify the teaching * * * it would simply make it at least difficult if not impossible to bring forth the kind of imaginative improvisation that * * * is especially important in a subject or a learning area like English."

Questioned as to whether the poem's suggestion of the joys of using drugs would offend the school's obedience to an Illinois statute requiring the teaching of the effects of the use of narcotics, one of the experts disposed of the subject as follows:

> "Q. Referring to the reference to drugs in that poem, do you think this poem * * * would tend to glorify that use?
>
> "A. I think it may in part, that the latter would be true."

And after some reference to what he described as our "drug addicted society," the witness concluded:

> "* * * so this additional exposure of the drug experience [its joyful use at Woodstock] I can't conceive of it again as being anything but a *trivial* plus on the side of drug use."

He later gave emphasis to the above by referring to the poem's invitation to drugs as being "exceedingly trivial."

One of plaintiffs' experts found hypocrisy in the contrast between contemporary society's professed notions of morality and the total conduct of that society. He said,

> "but as a social scientist it is my considered opinion that society in the form and conduct of that society is indeed a *sick society.*"

We ponder, then, whether a vaccine or therapy to be given to our eighth graders for this sickness—the hypocrisy of their seniors—may be found in exposure to Woodstock and its invitations.

At the hearing, appellants Brubaker and Sievert said they had not read the poem "Getting Together" before they first made it available to their students. There was testimony by the Board's representative, however, that when these teachers were approached by him, they did not rely on such excuse. Rather, Brubaker and Sievert indicated that what was in the poem was something that the students "could handle." At the ordered hearing they reiterated such a view.

Relevant to the testimony of appellants Brubaker and Sievert that they had not read the quoted poetry when they gave it to their classes, it should be emphasized that a substantial interval of time elapsed between their claimed tardy reading of it, the Board's reaction to its distribution, and their termination. Neither of them, however, employed this interval to make an explanation or to express to their students disapproval of the poem.

A member of the staff of the Superintendent of Public Instruction for the State of Illinois testified in support of the action of the defendant Board. He was director of the state program for gifted children. By education and experience he was qualified to express his view that the Woodstock brochure and its poetry had no educational value and was inappropriate for distribution to grammar school children. He found invalid the offered excuse that appellants had not read the brochure's poem "Getting Together" before distributing it. We share this

view. Parents of children who had brought the Woodstock brochure home also testified in support of the Board's action.

We think it right also to observe that upon learning of the Board's reaction to what had happened, none of the plaintiffs expressed any regret over the matter; neither did any of them seek reinstatement by assurance that corrective measures would be taken. They made no effort to come to a friendly solution with the Board. Their first step was employment of a lawyer who demanded a plenary hearing. This lawsuit followed almost a year thereafter. Whatever their ambivalence as to whether what they did was at most an innocent mistake or done after deliberation, their lawsuit insists and relies solely upon a position that what they did—providing, with their apparent approval, the Woodstock poetry—was but an exercise of the academic freedom guaranteed them by the United States Constitution.

After the hearing, the Board, by resolution adopted April 8, 1972, ratified and confirmed the dismissal of plaintiff-appellants. The resolution stated in part:

> "WHEREAS, the Board of Education has heard the evidence presented by and on behalf of the teachers, and on behalf of the School Administration and has heard the arguments of counsel
>
> * * * * *
>
> the Board * * * finds that each of the reasons for the dismissal of the teachers served upon them on January 14, 1972 by service on their attorneys has been sustained by the evidence; * * *."

Plaintiffs and defendants thereafter filed renewed cross-motions for summary judgment, and on August 21, 1972, District Judge William Bauer denied plaintiffs' motion and granted defendants' motion. In deciding the legality of plaintiffs' discharge, the Court felt that the question before it was: "have the plaintiffs herein been discharged for a basis wholly unsupported in fact or for a basis wholly without reason?" It would appear that by this expression District Judge Bauer was

employing the language used by the District Judge in the case of *Roth* v. *Board of Regents,* 310 F. Supp. at 979. Upon a review of the proceedings before the Board, the Court concluded:

> "It is this Court's opinion that the distribution of the brochure is a basis for discharge that is wholly without reason. The brochure contains a poem entitled 'Getting Together' which contains profane words and favorable references to drugs; this Court cannot say that all reasonable men would find that this poem was suitable reading material for elementary school children.
>
> "Accordingly, this Conurt holds that there was a basis for discharge of the plaintiffs which was not wholly unsupported in fact or wholly without reason."

That part of the District Court order which reads, "this Court cannot say *that all reasonable men* would find that this poem was suitable reading material for elementary school children," is unknown to us as a rule controlling the District Court's disposition of the matter. We consider, however, that his order's total language constituted a finding adequate to sustain the final judgment.

The Issues Presented for Review,[4] as set out in appellants' brief, are:

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4. Appellees present a preliminary procedural question asserting that the appeal by Clara Brubaker is not before us. The notice of appeal lists Clara S. Brubaker, John W. Brubaker and Ronald K. Sievert in their individual capacities as parties in this appeal. Relying on Rule 3(c), Federal Rules of Appellate Procedure, appellees argue that because Clara died over one year before the appeal was taken, the notice should have stated that the appeal was being taken in the name of "John Brubaker, individually, and as representative of Clara Brubaker," or words of like import.

It may well be that given a narrow construction of Rule 3(c), we would have no jurisdiction to entertain Clara's appeal. This view was adopted by the Ninth Circuit in *Penwell* v. *Newland,* 180 F. 2d 551 (9th Cir. 1950). In that case, however, only one party was named in the notice of appeal, whereas in the present case, John Brubaker who is Clara's personal representative by appointment of the Cook County, Illinois, Probate Court, is also a party. Her name is included in the notice of appeal. We believe that the estate of Clara Brubaker is a party to the appeal before us.

That the District Court erred,

"1. In failing to find that plaintiffs' constitutional rights, including particularly their academic freedom rights as protected by the First Amendment, were infringed by defendants' action in dismissing plaintiffs from their employment as teachers.

"2. In failing to award plaintiffs back pay and attorneys' fees based on the district court's earlier ruling that plaintiffs had been denied procedural due process in that they had not been given notice and a hearing prior to their discharge.

"3. In summarily dismissing plaintiffs' claim relating to defamation of character, when said claim raised genuine issues as to material fact which were incapable of resolution on a motion for summary judgment."

I. *First Amendment and Civil Rights.*

We have set out the factual background of this case at the above length because we believe that such recitation exposes the correctness of our affirmance of the District Court's holding that the School Board's action was not arbitrary or capricious, and was not an invasion of the appellants' constitutional rights. Appellants assert that making available to their eighth grade students the Woodstock brochure's poem "Getting Together" was an exercise of the free speech guaranteed to them by the First Amendment and an exercise of their Civil Rights, protection of which is vouchsafed to them by 42 U. S. C. § 1983. They said that their dismissal invaded their Right of Academic Freedom, and they suggest that what was done would have a "chilling effect" on the exercise of academic freedom by other teachers.

We do not believe that however much the reach of the First Amendment has been extended and however eager today's courts have been to protect the many varieties of claims to civil rights, the appellee school board had to put up with the described conduct of appellants.

Appellants' address to us includes this statement:

> "[I]nquiry should be made by the court as to whether the publication in question was inappropriate reading for the students involved and whether a serious educational purpose was sought to be achieved. Plaintiffs' expert testimony at the hearing before the School Board, and defendants' lack of testimony concerning this issue, established beyond any reasonable doubt that the use of the Woodstock brochure by plaintiffs was not only appropriate, *but admirable as a teaching tool.*" (Emphasis supplied.)

Relevant to this assertion, we observe that neither the appellants nor their experts emphasized with any degree of specificity what parts of the brochure, other than the poetry, could be classified as "admirable as a teaching tool." The experts primarily addressed their applause to the poem.

Appellants further argue that they were denied due process,

> "because there existed a lack of ascertainable standards by which they could measure their conduct."

They do not attempt definition of the relevant and ascertainable standards which they say the School Board should have promulgated. We will not fault a school board for not anticipating that eighth grade teachers might distribute to their students, without explanation or assigned reason therefor, poetry of the caliber of "Getting Together." Appellants say that the Board was wrong because it reached a conclusion as to the poetry's impropriety,

> [w]ithout the benefit of any supporting expert testimony in the fields of literature, obscenity or drugs."

Experts should not be needed to support a conclusion that is obvious. Moreover, the Supreme Court, in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 56 (1973), rejected the contention that " 'expert' affirmative evidence that the materials were obscene," was necessary when the alleged obscene material was itself placed in evidence. Similarly in this case no "expert" testimony was required.

Relative to the brochure's admitted invitation to the use of drugs, the evidence disclosed that Ill. Rev. Stat. ch. 122, § 27-10 required that the "Nature and effect of alcoholic drinks and their effects on the human system" be taught to pupils below the second year of high school and above the third year of elementary school work. Appellants argue that they were not aware of such statute, and that, therefore, it "did not constitute the kind of constitutionally permissible ascertainable standard which should have placed plaintiffs on notice that their conduct in distributing the Woodstock brochure [with its glorification of grass and acid] would subject them to dismissal." Whether they knew of the statute or not, we consider that these teachers should have known better than to hand to their young students something that invited the use of the described drugs. Additionally, appellants had been aware of and had participated in previously presented teaching programs expounding upon the baleful consequences of the use of drugs and alcohol.

In rejecting appellants' claim of academic freedom, we note the following from the First Circuit's opinion in *Mailloux* v. *Kiley*, 436 F. 2d 565 (1st Cir. 1971), where a claim of academic freedom was similarly raised. There the Court said:

> "The court in no way regrets its decision in Keefe v. Geanakos, 1 Cir., 1969, 418 F. 2d 359, but it did not intend thereby to do away with what, to use an old-fashioned term, are considered the proprieties, *or to give carte blanche in the name of academic freedom* to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. *Cf.* Close v. Lederle, 1 Cir., 1970, 424 F. 2d 988, cert. denied, 400 U. S. 903, 91 S. Ct. 141, 27 L. Ed. 2d 140. Here, particularly, such questions are matters of degree involving judgment on such factors *as the age and sophistication of students, relevance of the educational purpose, and context and manner of presentation.*" 436 F. 2d at 566. (Emphasis supplied.)

In affirming the District Court order on remand, the First Circuit also said in *Mailloux* v. *Kiley, supra,*

> "With all respect to the district court's sensitive effort to devise guidelines for weighing those circumstances, 323 F. Supp. 1387, we suspect that any such formulation would introduce more problems than it would resolve. At present we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech." 488 F. 2d 1243.

The validity of our conclusion that the District Court properly found no violation of appellants' First Amendment or Civil Rights emerges so clearly that we decline to add, by our own extended dissertation, to the already abundant literature on the subject we deal with.

II. *Back Pay and Attorney Fees.*

1) *Back pay.*

Appellants argue that in all events the Brubakers are entitled to an award for the pay that they would have received from the date of their termination—May 4, 1970—to the end of the school year—June 12, 1970. Appellant Sievert seeks back pay for the above period and for the pay he would have received for the school year 1970-1971. As noted previously, all appellants were nontenure teachers; the Brubakers had been advised before May 4, 1970 that they would not be employed for the following year. Sievert, however, had been advised that he would be reemployed for the 1970-71 school year. Appellants' position is that notwithstanding that they had been given the reasons for their termination, they were also entitled to, but initially refused, a hearing. They argue that the court-ordered hearing did not provide them with due process.

Cases cited by appellants to support their claims for an award of back pay are distinguishable from the present case. *Horton* v. *Orange County Bd. of Educ.*, 464 F. 2d 536, 538 (4th Cir. 1972); *Rolfe* v. *County Bd. of Educ.*, 391 F. 2d

77, 81 (6th Cir. 1968); *Jackson* v. *Wheatley School Dist. No. 28*, 464 F. 2d 411 (8th Cir. 1972); *Bates* v. *Hinds*, 334 F. Supp. 528, 533 (N. D. Tex. 1971); *Callaway* v. *Kirkland*, 334 F. Supp. 1034, 1038 (N. D. Ga. 1971). In so distinguishing, we emphasize that the notices of termination given to appellants each set out the reasons therefor. As ordered, a plenary hearing was had before the School Board. The District Court held, and this Court now holds, that there was good cause for termination of each of the appellants.

In *Horton* v. *Orange County Board of Education, supra*, the court emphasized that:

> "In none of the letters advising her [the discharged teacher] of the termination was she told of the grounds therefor." 464 F. 2d at 537.

Such failure is not present in our case.

Back pay was also allowed in *Rolfe* v. *County Board of Education, supra*, where the Sixth Circuit affirmed a District Court judgment,

> "holding that the discharge of two schoolteachers, [plaintiffs] appellees herein, was discriminatory because it was based on consideration of race." 391 F. 2d at 78.

Also in *Jackson* v. *Wheatley School District, No. 28, supra*, the Eighth Circuit recited that in an earlier hearing of the same case,

> "we held that the Wheatley School Board had unlawfully discharged three black teachers [the plaintiffs in the above cited case]." 464 F. 2d at 412.

In *Bates* v. *Hinds, supra*, the District Judge's opinion does not consider, nor rule upon, whether there were valid grounds for dismissal of the involved teacher. Although Bates was awarded back pay and attorney fees, the court's ruling and award appears to have been bottomed upon the failure of the school authorities to give the discharged teacher a fair hearing

or adequate notice of the reasons for his discharge. The District Judge said, *inter alia:*

> "Plaintiff never received official word of his termination." *334 F. Supp. at 531.*
>
> * * * * *
>
> "The teacher * * * was not given written notice of the charges against him * * *." 334 F. Supp. at 532.
>
> * * * * *
>
> "The Court concludes that Bates' hearing satisfied neither the procedural due process standards set out by the Fifth Circuit nor the rudiments of fair play," 334 F. Supp. at 533.

The case of *Callaway* v. *Kirkland, supra,* presented some procedural novelties inasmuch as the parties did agree upon a settlement. A District Judge, however, awarded back pay over and above the amount received by the teacher upon the settlement. In doing so, the District Court said:

> "Since there has been no correction of the procedural defects connected with plaintiffs' dismissal *and no adjudication of the basis for the dismissal,* the court need look no further than its ruling of December 29, 1970, to find that defendants unlawfully interfered with plaintiff's expectancy of reemployment by summarily dismissing him without affording him procedural due process. Therefore, plaintiff is entitled to recover the back pay which he seeks."
>
> * * * * *
>
> "Plaintiff has consistently denied defendants' allegations of misconduct and has never been provided with a meaningful opportunity to counteract those allegations." 334 F. Supp. at 1038. (Emphasis supplied.)

It is clear that none of the above cases are in point here where written notice of the reasons for termination were given, a court ordered plenary hearing on the matter was had and the school board, a District Court, and this Court, hold that appellants were terminated for just cause.

We are essentially being asked to rule that where school authorities are made aware of a non-tenured teacher's misconduct, they must continue such teacher *in service until* a full dress hearing has been provided, or pay the terminated teacher's salary until such hearing can be arranged. We decline to do so in this case where the propriety of the termination has been fully vindicated by the record made upon such hearing. It should also be emphasized that the attorney early engaged by appellants was promptly advised that his request for a hearing had been submitted to and declined by the Board. At the time of these events, no decision of the United States Supreme Court, a United States Court of Appeals, or the courts of Illinois, had held that a hearing had to precede termination.

We mention, too, that appellants waited for almost a year from the time they received the reasons for their termination before instituting this lawsuit. At that time there was pending before this Court an appeal from a District Court holding that two non-tenured college professors were entitled to a hearing before they were refused reemployment for another year. The decision of this Court affirming such holding was announced July 1, 1971, after this suit was started, *Roth* v. *Board of Regents of State Colleges*, 446 F. 2d 806 (7th Cir. 1971). Such decision was reversed by the Supreme Court in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). The Supreme Court there held that non-tenured teachers are not entitled to a hearing upon a decision of school authorities not to reemploy them. That decision, however, held that termination of such teachers *during* an existing school year had to be accompanied by obedience to due process, 408 U. S. at 576-77. But it did not say that termination had to await a hearing regardless of whether such hearing ultimately disclosed that the termination was for good cause.

We are aware of decisions which, under their facts, have said that a due process hearing should have preceded the chal-

lenged action. Such cases were referred to in footnote seven in *Board of Regents of State Colleges* v. *Roth*, 408 U. S. at 570, cited to consider the need for a hearing "before the termination becomes effective." *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). In *Bell*, a Georgia statute allowed suspension of the driver's license of an uninsured motorist "involved in an accident * * * unless he posts security to cover the amount of damages claimed *by aggrieved parties in reports of the accident.*" (Emphasis supplied.) Such action would take place without reference to whether the public authorities had, or claimed to have, made any investigation as to whether the driver in question was at fault. In the present case, however, the school authorities had investigated the charged misconduct, and such misconduct was admitted to have occurred. The School Board's decision to discharge appellants and their reasons therefor were made known to appellants. In the other case cited in *Roth*, *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U. S. 886 (1961), the Court stated the following:

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. 'For, though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet, this is not universally true.' Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 280. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n* v. *WJR*, 337 U. S. 265, 275-276; *Hannah* v. *Larche*, 363 U. S. 420, 440, 442; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 708-709. ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " 367 U. S. at 894-95 (Emphasis supplied.)

We find no decision of the Supreme Court or of any of the Courts of Appeals holding that where, as here, the propriety of

the discharge is sustained after plenary administrative and judicial hearings, the public authority—here a school board—must nevertheless pay the discharged employees their wages until such hearings shall have been concluded, however long delayed. The rule that appellants ask us to announce would require that, however wrong the admitted conduct of a school teacher, a school board must refrain from discharging her or him until a full dress hearing upon whether such conduct warranted discharge can be arranged and concluded. We decline to so hold.

We come finally to the question of whether the termination of the appellants without a *prior* hearing denied them due process of law. Since this case was heard in the District Court, and thereafter submitted to us on appeal, the Supreme Court opinion in *Arnett* v. *Kennedy*, ... U. S. ....., (1974), 42 U. S. L. W. 4513, has come down. We consider that its majority opinion sets at rest the question of whether, no matter what the cause, a hearing must as a matter of obedience to the Constitution, *precede* the termination of a teacher or any public employee. We read the opinion as holding that such a *prior* hearing is not in all cases constitutionally essential. There, a civil service employee was terminated in conformity with an Act of Congress—5 U. S. C. § 7501—which, after setting out certain procedures that had to precede termination of a civil service employee, concluded:

> "Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay."

The Act required notice of the charges upon which termination was made and also provided for an appeal that could be taken after the termination to test the validity of the discharge. Without resort to such departmental procedures, the involved employee began an action in the United States District Court attacking his discharge and asserting, as set out in *Arnett* v. *Kennedy, supra,*

> "that the charges were unlawful because he had a right to a trial type hearing before an impartial hearing officer *before* he could be removed from his employment * * *." 42 U. S. L. W. at 4514. (Emphasis supplied.)

He further asserted that statements made by him which caused his termination "were protected by the First Amendment to the United States Constitution." It was his position that his discharge *prior* to a hearing denied him "procedural due process of law."

A three-judge District Court, convened pursuant to 28 U. S. C. §§ 2282 and 2284, held that the discharge procedures authorized by the Act and attendant Civil Service and OEO Regulations denied appellee due process of law. By summary order it directed that appellee be reinstated in his former position with back pay, and that he be accorded a hearing *prior* to removal in any future removal proceedings. The District Court decision, reported as *Kennedy* v. *Sanchez*, 349 F. Supp. 863 (N. D. Ill. 1972), sets out that the claim which it sustained and its dispositive ruling as follows:

> "[T]he procedure by which Kennedy's employment was terminated deprives him and his class (which has not been determined) of due process under the Fifth Amendment by its failure to provide a full evidentiary hearing *prior* to termination, with the right to be heard by an impartial hearing officer; the right to present witnesses; the right to confront and cross-examine adverse witnesses; and the right to a written decision indicating the reasons for discharge or suspension and the evidence relied upon. This Court agrees." 349 F. Supp. at 864.

As we read it, the majority opinion of the Supreme Court in reversing the District Court held that a plenary hearing before a termination is not a constitutional essential of due process. There the Court was specifically dealing with a relevant Act of Congress wherein it was provided that in terminating a civil service employee it was not required that a hearing must be had *prior* to discharge. The thrust of the Court's holding can best be

gleaned from its statement as to the issue involved. The Court said:

> "We must first decide whether these procedures established [by the Congress] for the purpose of determining whether there is 'cause' under the Lloyd-LaFollette Act for the dismissal of a federal employee *comport with procedural due process,* and then decide whether that standard of 'cause' for federal employee dismissals *was within the constitutional power of Congress to adopt.*" 42 U. S. L. W. at 4517. (Emphasis supplied.)

Its controlling opinion concluded that such procedures did comport with due process and that they were within the constitutional power of Congress to adopt. The opinion from which we quote above was written by Mr. Justice Rehnquist, with occurrence by the Chief Justice and Mr. Justice Stewart. A separate opinion was written by Mr. Justice Powell with the concurrence of Mr. Justice Blackman. Justice Powell's opinion emphasized the post-termination precedures provided in the relevant Act of Congress. It began with the observation, *inter alia,* that,

> "I also agree that appellee's discharge did not contravene the Fifth Amendment guarantee of procedural due process." 42 U. S. L. W. at 4530,

and concluded that:

> "On balance, I would conclude that a *prior evidentiary hearing is not required* and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests." 42 U. S. L. W. at 4532. (Emphasis supplied.)

We are aware that Justice Powell appears to have been motivated in part by the post-termination procedures available to, but not employed by, the discharged employee. As to the reach of the discussed opinion, we observe that it is the law that the Congress may not by its legislation override the Constitution any more than other public employers may do so. Applicable to the case at bar there did not exist any Illinois statute spelling out pro-

cedures to be followed in termination of a school teacher. In all events, the *Kennedy* decision sets at rest and denies appellants' contention that absent a *prior* hearing the school board must pay back wages to the appellants. The appellants have now had a plenary hearing, the disclosures of which sustain the validity of the school board's action. The fact that a hearing was initially refused and was had only when ordered by the District Court does not impair the rightness of what was originally done. We repeat that at the time of appellants' termination there was no clear rule of law or constitutional command that a hearing was required. It is relevant too that appellants waited for nearly a year before invoking judicial help. At no time have appellants denied the doing of that which prompted the school board's action. There defense is, and was, that they had the right to do what they did. It should be mentioned that their initial demand for a hearing neither denied the factual recitals of the notice of termination, nor relied upon a claim ultimately made that what they did was merely an exercise of academic freedom.

Evidence at the hearing disclosed that complaints by the parents of appellants' students activated the investigation which led to the board's action. It was right for school authorities to take cognizance of such parental concern. The board did not act without providing appellants with opportunity to explain or offer justification for what they had done. Appellants did neither, and their first response was to employ a lawyer.

Upon consideration of the record before us, we decline to award back wages to appellants.

2) *Attorney fees.*

Allowance of attorney fees is an "inherent equitable power" of the court, utilized wherever " 'overriding considerations indicate the need for such a recovery.' " *Hall* v. *Cole,* 412 U. S. 1, 5 (1973). The Court in *Hall* stated the following principles for awarding attorney fees:

> "Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1972); see, *e.g.*, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968); *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *Bell* v. *School Bd of Powhatan County*, 321 F. 2d 494 (CA 4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA 4 1951). In this class of cases, the underlying rationale of fee shifting is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant.
>
> "Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 412 U. S. at 5.

This Court has long held that it is within the discretion of the District Court to allow or refuse the award of attorney fees, and that we will interfere only where that discretion has been abused. *Gordon* v. *Illinois Bell Telephone Co.*, 330 F. 2d 103, 107 (7th Cir.), *cert. denied*, 379 U. S. 909 (1964); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 571 (7th Cir. 1951), *cert. denied*, 342 U. S. 909 (1952); *Official Aviation Guide Co.* v. *American Aviation Associates, Inc.*, 162 F. 2d 541, 543 (7th Cir. 1947).

We find no such abuse in the present case. Our review convinces us that the board acted at all times in good faith; it did not intend to be oppressive as to the rights of appellants. We similarly find no benefit being conferred on "other members of an ascertainable class," *Hall, supra.*

III. *Defamation.*

In count III of their complaint, appellants alleged that:

> "The statements made by defendant members of the BOARD OF EDUCATION . . . *were false and were known*

> *by said defendants to be false* when made, recorded and published by them. Said statements were made by defendant members of the BOARD OF EDUCATION with the purpose of injuring plaintiffs."

As a result of such statements, appellants claim to have suffered irreparable harm to their reputations. This claim was dismissed by Judge Bauer on defendants' motion for summary judgment.[5]

We first observe that the only relevant *falsity* resides in appellants' above charge that the statements made by the Board "were false." The truth of the facts upon which the terminations were made was admitted by appellants. We, however, discuss the subject this much further. Appellants' brief alleges that "the matter" was discussed in "executive session" held on April 30, 1970, and an agreement as to dismissing appellants was reached on May 1, 1970. They allege further, however, that the resolution to dismiss, as set out at length herein, "was adopted in open session." Statements made at such meetings have been held by the Illinois Courts to be absolutely privileged. *McLaughlin* v. *Tilendis*, 115 Ill. App. 2d 148, 253 N. E. 2d 85, 88 (1969); *Larson* v. *Doner*, 32 Ill. App. 2d 471, 178 N. E. 2d 399 (1961).

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5. One of appellants' arguments is that Judge Bauer's August 21, 1972 dismissal of their claim on a motion for summary judgment was improper because Judge Will, on September 16, 1971, had refused to grant appellee's motion for summary judgment. In *Bowles* v. *Wilke*, 175 F. 2d 35, 37 (7th Cir.), *cert. denied*, 338 U. S. 861 (1949), this Court stated:

> "We think it beyond question that as to interlocutory orders entered in the District Court, the trial judge himself or any judge succeeding him in the disposition of a pending cause may vacate any such prior order. The only restraint upon a second judge in passing upon an interlocutory issue decided by another judge in the same case is one of comity only, which in no way infringes upon the power of the second judge to act."

Under the circumstances of this case, Judge Bauer did not act improperly in granting appellees' renewed motion to dismiss. A period of almost one year had elapsed between Judge Will's and Judge Bauer's rulings. It was during this period that the facts of the case were developed and the issues narrowed.

Because the question of whether an absolute privilege exists is a matter for the court to decide, *Larson* v. *Doner, supra,* 32 Ill. App. 2d at ....., 178 N. E. 2d at 400, and because there were no issues of material fact, the District Judge properly dismissed appellants' defamation claim.

The decision of the District Court is affirmed.

FAIRCHILD, *Circuit Judge* (dissenting). I do not believe that the Woodstock brochure was either so irrelevant to educational goals or patently offensive that the plaintiffs were precluded from exercising their judgment as teachers and electing to employ it in their classes. Accordingly, I respectfully dissent from the majority's conclusion that the district court correctly held these discharges did not violate first amendment rights. I concur regarding the failure to award attorneys' fees or back pay pending the Roth-type hearing, and dismissal of the defamation action.

Freedom to discuss controversial or unpopular ideas in the schools is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1966). See also *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 506-7 (1969). Academic freedom "does not grant teachers a license to say or write in class whatever they may feel like." *Mailloux* v. *Kiley,* 448 F. 2d 1241, 1243 (1st Cir., 1971). See *Clark* v. *Holmes,* 474 F. 2d 928, 931 (7th Cir., 1972), *cert. denied,* 411 U. S. 972 (1973). However, particularly where the school board has not formulated standards to guide him, academic freedom affords a teacher a certain latitude in judging whether material is suitable and relevant to his instruction. "First Amendment freedoms need breathing space to survive. . . ." *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 433 (1963).

These instructors did not exceed the bounds which germaneness places on protected classroom speech. The discussion and distribution of the Woodstock brochure consumed no significant

amount of school time. Compare *State ex rel. Wasilewski* v. *Bd. of School Directors,* 14 Wis. 2d 243, 260-61, 111 N. W. 2d 198, 208-9 (1961), appeal dismissed, 370 U. S. 720 (1962). Further, it was arguably relevant to the course of instruction. Sievert's class had just completed study of the history of rock music; Brubaker's was considering the construction of musical instruments. The 1969 rock music festival at Woodstock, New York had at least some significance to these subjects, significance which was perhaps more evident in April, 1970 than it is today. More importantly, however, the appropriateness of a particular classroom discussion topic cannot be gauged solely by its logical nexus to the subject matter of instruction. A teacher may be more successful with his students if he is able to relate to them in philosophy of life, and, conversely, students may profit by learning something of a teacher's views on general subjects.[1] Academic freedom entails the exchange of ideas which promote education in its broadest sense.

The Woodstock brochure was not so effensive that its classroom use was obviously improper. The school board had not promulgated any standards against which plaintiffs could measure this type of literature to determine whether board policy forbade its use.[2] The board points out that certain conduct

1. The Supreme Court recently noted, in the context of prisoner correspondence rights, the reciprocal nature of first amendment speech rights in *Procunier* v. *Martinez,* 42 U. S. L. W. 4607, 4610 (April 29, 1974). Similarly, academic freedom includes both the freedom of the student to hear as well as that of the teacher to speak.

2. The board relies in part on a provision in Ill. Rev. Stat. ch. 122, § 27-10 (1969), repealed effective Oct. 1, 1973 by P. A. 78-334, § 2:

> "The nature of alcoholic drinks and other narcotics and their effects on the human system shall be taught in connection with the various divisions of physiology and hygiene, as thoroughly as are other branches, in all schools under State control. . . ."

I fail to see how this statute afforded an instructor any guidance whatsoever in determining whether a particular work which alludes to the use of alcohol and narcotics is suitable educational material.

(Footnote continued on next page)

patently exceeds "the bounds of the recognized standards of propriety" and a particular rule giving advance notice that it is forbidden is unnecessary. *Wasilewski, supra,* at 257, 111 N. W. 2d at 206. See also *Shirck* v. *Thomas,* 447 F. 2d 1025, 1027 (7th Cir., 1971), vacated on other grounds, 408 U. S. 940 (1972). However, the material in question does not fall into this category.

First, plaintiff's experts in the field of education characterized the Woodstock pamphlet as suitable, even admirable, teaching material for eighth grade students. Whether or not this opinion be accepted, the classroom use of this work can hardly be considered "conduct, generally condemned by responsible men." *In Re Ruffalo,* 390 U. S. 544 (1968), *reh. denied* 391 U. S. 961 (concurring opinion). Second, the brochure is not obscene in the legal sense. The use of profanity does not transform the controversial into the obscene. See *Cohen* v. *California,* 403 U. S. 15, 20 (1971); *Fujishima* v. *Board of Education, supra* note 2, at 1359 n. 7. *Miller* v. *California,* 413 U. S. 15, 24 (1973) described obscenity as limited to "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." The bulk of the pamphlet consists of inoffensive factual accounts of the Woodstock festival. Even assuming the continuing validity of the variable obscenity doctrine,[3] and making the widest allowances for the age of plaintiffs' students, neither the brochure as a whole nor the poem "Getting Together" begin to satisfy the *Miller* criteria. See *Jacobs, supra* note 2, at 610.

The board also refers to its policy no. 3547 which in effect prohibits the distribution of printed matter without its prior approval. This court has invalidated similar regulations for overbreadth. *Jacobs* v. *Board of School Commissioners,* 490 F. 2d 601, 604-9 (7th Cir., 1973), *cert. granted,* 42 L. W. 3666. See also *Fujishima* v. *Board of Education,* 460 F. 2d 1355 (7th Cir., 1972).

3. See, *e.g., Ginsberg* v. *New York,* 390 U. S. 629 (1968).

Whether the board could constitutionally have promulgated specific rules which would have prohibited the classroom use of this literature by eighth grade students is not the issue presented. I cannot conclude that these materials are so clearly improper as to justify the mid-term discharge of an instructor who elected to use them in his teaching.

I would reverse the district court's summary judgment for defendants and remand for determination of the amount of back pay due plaintiffs as a result of their unlawful discharge.

no one
who was
there
will ever
be the
same

WOOD

BOB MAURICE Gale and MIKE WADLEIGH

Wadleigh and Maurice: Ready For The Moment When It Came

Most movies consist of moments—enough to compose a memory and sometimes one, or sometimes two. "Woodstock," concerns of the young — performers and audiences, together—moving at three points. It wasn't planned that way. It came out that way because the moment had arrived.

Producer Bob Maurice and director Mike Wadleigh were ready when it came. They had rallied together a gifted team of young filmmakers and cameramen. And armored a half-million words of the finest movie equipment. When what happened started to happen, they were ready. Their footage caught fire the hearts of the Woodstock Fair. Through three great rainstorms, tides of mud, 70 hours of shooting, 31 hours of sound takes, 450,000 people, three day-and-night days of dissension, amusement and release, they caught on film and tape for all of history the most valuable two hour experience of Bethel, N.Y.

In months of slow motion agony there will be. Over 315,000 feet of film (120 hours of shooting) were processed on new and profoundly sophisticated editing equipment, called Kodak, which allows as many as six views of the same subject to be seen at once. More important than the technical advantages is the sympathy, an over the months-after rush and discovery of the need to a common goal.

Wadleigh, joined by assistant directors-supervising editors Martin Scorsese and Thelma Schoonmaker, with producer Maurice, set hand to twenty, with the use of tape and film through the Editors. Like a group of great surfers having to do an encore to a new endeavor. They emerged with three hours, 10 reels of Woodstock's first year by the name of "Woodstock."

It is a movie, of course, and it is being released by a movie company, Warner Bros. It may well turn out to be a feeding-ground for life in America.

Filmmakers brought to Bethel, N.Y., to shoot "Woodstock" in their world-memory now are pictured, Bethel man with camera and headset, lower right, a biker Wadleigh.

Baez: Feelings, Not Words, Are What Matter

When Joan Baez is dealing with words, not in the form of a book ("Daybreak"), or as a speech on civil rights or the peace movement. When she sings, she conveys herself with something else. "I don't ever very much think about what I'm going to say or why, or even what it says. All I care about is how it sounds and the feeling in it," she states.

Joan Baez, the "Queen of Folk" as A Ant Pier was a name of great feeling. She was a few weeks away from the birth of her first child. The father, her husband, David, was at a Federal prison serving a 3-month sentence for draft refusal. The song, incongruously, of love.

She has that unsweet person in hand and that sweet one was with herself. And because of it she has become, more her natural professional appearances at Woodstock in 1969, the most significant figure in the folk field. All of her previous albums, for Vanguard were, and are, bestsellers.

The newest is named "David's Album." And her child is named Gabriel. Gabriel is David's surname in federal Prison Petaluma, California.

JOAN BAEZ

C. S. N. & Y: Talent Can Be Singular And Plural, Too

Crosby, Stills, Nash & Young are harbingers of the new breed in supergroups. Each of them is a superstar all of whom nevertheless are talented, experienced vocalists, musicians and writers, all of whom are splitting from the group they formed.

Vocalist Graham Nash (ex-The Hollies) voices it this way: "The natural effect goes from one to one and the natural group is the maximum. Our weakness is that we don't want to feel as if we have to be in a certain place at a certain time, or arrange our lives to suit anybody but ourselves. If you're into something groovy, and something groovy comes along, you should go and do that. We have all paid our dues.... We're just a groovy different."

The Woodstock Fair was one of the earliest occasions when Crosby, Stills & Nash (ex-The Byrds), David Crosby (ex-The Byrds), Stephen Stills (ex-Buffalo Springfield) got together with Nash. It was unsure. Though they were pretty sure they'd have a folk-rock group (as other). But they didn't. What they did and must for the crowd at Bethel showed them it was possible to be both singular and plural, and some of us are magic.

GETTING TOGETHER

by Paul Williams

Woodstock felt like home. A place to take said. A place to make love. Felt a little like a place we'd been before, but hard to remember, like yesterday's vision, like last night's dream. But now it's all now, and it feels like we're somehow coming back.

It was still too cool to be true.

Woodstock felt like the morning news. See more up today.

Joy! Breathlessness!

Woodstock felt like a swell of energy, wave of oneness that fills the heart and flows on over the lower hearts you.

Woodstock was freedom. Don't ever forget that. Don't ever settle for less.

Woodstock was simply getting together. We could do it right now. Just you and me. And anyone else we'd want to be with us....

Sun up in the mornings, blisses in the water. People on the hill.

I remember the rain. Running and smiling, blind and laughter. Nothing to fear.

It was a great shame; people on the edges were driven away; here in the center drew closer together.

We seemed to see more for days.

It was easy for it to happen....

It felt like a new planet we in. Town and sometown. Carthage, Jerusalem. Out in the country with half a million people. Amsterdam rebirth on the planets.

Mantovani.

A feeling of being full.

Of having something to share.

Woodstock the moment of gathering together, touching your brother, opening eyes we never knew existed, seeing a half an inch and the sea of dreaming. That's me!

Oh we can really do never stopping, I see what I have to share, ah what are especially!

Staring at each every smile

Dreams of a million lovers.

Great universal inspiration.

Point of our own source of laughter.

Coming together.

Bodies naked into the water, touching each other, opening hearts new greater awareness

of living together

of living on the planet

of living in a sea of everything—a movement, a motion, like a drop of water in the core of the sun, moving together we're a big feeling mass....!

Woodstock felt like a living organism, living minds, being a cell, one of the organisms, energy-food overflowing through the whole.

It's easy for it happening. A moment or yesterday. It was all was was to be had, but when you feel it again you'll remember just how high we are.

Old world overthrowing, new world being born. Woodstock a festival of getting together, a festival of birth, not the first and certainly the last that every here you're born it feels like a whole new life.

And it is. What a feeling! Pure feeling, energying down waves each-loving world, love I am, I know who I am.

Heart of gold etc. Makes you feel good to be alive.

We who is not busy being born is busy dying.

"Why can't we live together like we should be?"

Woodstock felt like a nice place to be. Peace be with you, brother, all we must again.

GRAHAM NASH

stock

ALVIN LEE

JOHN SEBASTIAN

Sebastian: Finger On the Pulse Of His Time

As a member of The Lovin' Spoonful, John Sebastian proved himself a top performer, singer and songwriter. Yet it is still taking its toll as a person and member to get on stage and face the audience alone.

At Woodstock, Sebastian demonstrated his powers for the challenge. As he sets it, "leaving The Spoonful was a very confusing thing. There were a hundred little reasons, but primarily—and not only for me but for all of us—The Spoonful had lost its magic."

Today, along with solo recording and performing, he is becoming well as a composer. Adding to his long string of record hits, he has done the scores for a Broadway show, "Jimmy Shine," and two screen projects, "What's Up, Tiger Lily?" and "The Magic Christian."

Like a Mark Twain of pop music, Sebastian has always had a finger on the pulse-beat of his generation. Now at the halfway mark between the formation of the first and the presence of his new future, it is appropriate that he has seven appearances a week in "Woodstock," the film that belongs to that generation.

Ten Years After: Logical Progression, No Forced Changes

Ten Years After is a complex, blues-rock quartet who have made their way to exceptional success combining, on stage, sheer ingenuity of the power of their highly individual forces.

At Woodstock, they outdid themselves. Simply an English group playing what Alvin Lee, lead guitarist and songwriter, terms "blues-based rock with a bit of boogie," but their impact was monumental. The drama of Alvin Lee's hands flying at once throughout the rock panorama to underpin the chant of a jam number with a gymnastic tangle mind.

The group, whose other members are Leo Lyons on bass, Ric Lee on drums and Chick Churchill on organ, have since produced a new album, "Sssh," and are attracting attention wherever they appear.

Spectacle or not, Ten Years After duly deadlocked as rock musicians in the mind sense. They play emotionally when blues, a device constantly put to use, and has grown out of blues forms, and more and jam. They are trying to develop a style that is logical progression without any forced changes.

"We don't think the elements of blues have a to remain blues," says Lee. "When we do a blues song, it's more to style than as forming. The feeling is always easy to do."

WHAT THEY SAID...

Woodstock was loads and noises and flowers and sunshine and beautiful people.

—John Sebastian

This was the "Come With The Wind" of our generation.

—Alvin Lee

I'm glad it rained. It was a great storm, it really was.

—Joe Cocker

The scene at Woodstock was just awesome scene. If you got caught in a crowd like that it would just overwhelm.

—Crosby, Stills, Nash & Young

It's happened at Woodstock, why shouldn't it happen again?

—John Cadlow

Cocker: Volume For Itself Just Won't Do

Joe Cocker has written few of the songs he sings, but later he sings them has put them on the memory or emotion of the moment, and he has done it on his gold-record album of his performance.

He is one different from his peers in another way—he doesn't believe in volume for volume's sake. "I used to have a huge stack of speakers and amplifiers," he says, "but I got rid of them. I only use about amplifiers now."

There must also, Joe Cocker, were enough to mend the Woodstock Festival on its head. Or is he?

He set on a merger has gone around the world, but could be less concert goers away from Sly's head, though he made a memorable, and memorable, effort to get away from a home town 200 miles north of London. There he worked as a gas-fitter by day and sang on pubs at night. His powerful emotional voice, energy with a blues style frankly taken from blind Ray Charles, stood his audience. The group was also a dynamic one, and Joe started to go on his own, one of his songs ("With a Little Help from My Friends" and "Delta Lady") have climbed to the Top-20 chart in Boston, and abroad.

All of that phenomenal has, of course, his own lessons of the stage. Like Cocker believes, "a good concert comes ... during a crowd about what you are going to do with it."

JOE COCKER

THE SOUND TRACK ALBUM

Atlantic Records this spring will issue on the Cotillion label the original soundtrack recording of "Woodstock." The album will consist of two LP records packaged in a deluxe box with a booklet of material (like a poster) inside. All the key artists featured in the film will be on the soundtrack album. A single, featuring Crosby, Stills, Nash & Young singing the theme song of the picture, "Woodstock '69," was released by Atlantic on March 3.

WOODSTOCK IS YOU

by Ellen Sander

Associate Editor, Sound Scene
Editor, Los Angeles Free Press

With the odds stacked implicitly against a happening forces, there's a turbulent current of hope crackling through these words. The way out of here comes down to a genuine love for others and fellow man a feeling, pervaded, down perceived. Look far enough over yonder and it's a pure world swarming and somehow the way up has returned to the wide-going back to where we once belonged, Joy is alive and well in each and each.

Everyone I know feels it. Words are failing, words in common use can only say and be a lie, values close to meaningless feelings more than human. Grass is now a mere joke or at best a no-no drug. A passing, yes, it subsequently proclaimed in a generation of pure darkness simply governed by ever increasing numbers of new children in pockets, experimenting their wares. Woodstock was one of them, the largest ever transmitted was yet.

At Woodstock, values it all came together, close to the earth, under the sky, breathing almost our own movement of the three days. Even the rain that threatened to ruin a whole challenging us to run a through was a part of it. The challenge was met, the dream came on, the magic was released from the bottle of mankind's unseen. A feeling of the soul was energized, left blowing from soul and soul, and we were not the possessions, but the soul of Woodstock was ours, your voice sound there, your voice was to mine, your voice walked your hand, your voice turned about it and were locked with the magnificence and consonancy of it all.

What emerged was a glimpse of the future, a dream dare called tomorrow. Each moment lasted three the length of its passage and the degree of its inner presence there. It became a model of the complete world.

But so many have coming on a way no surprise. Expectation it was promised, a great leap in the consciousness was upon us. The energy and spiritual had been growing considerably, enormous pay means power to Woodstock. A great many of us were there, and we felt it, but few were tuned out to the vibration we found. "Why here? Why there?" Lessening the overbalance in crowding the power. By bus, by magic, by many purposes, it happened at Woodstock.

Unpeace, unrest, weakness, terror. That's what adds like a saw through these the generation. Silence and reasons exist side by side in man. Woodstock was an unreal and apparent harmony in the fabric. Inspired, unreal and polluted pressures evolved we love us. Confessions has a diseases, youth has a real disease.

It became a three day long-as about food, shelter and joy were shared. Apparently love rising in masses, breaking out of thousands of young people suddenly turned on. Everyone was high on love. Every person helped everyone. A dinner was made; garbage pails, love and compassion was called. It seemed, honestly, professionally, we were all involved by one another on music but the darkness of a festival after which nothing will ever be the same. It became a microcosm of a more real human dream, a atmosphere for a communication of all the changes we felt. It was an explosion of energy-an awareness and freedom of a moment that means what now, a miracle as the best example of just how together we can be. Everyone.

The Woodstock Festival, devoted to music and art, also became a place to fall in love. Above marriages followed from meetings here.

WLS RADIO 89

wood

V. ASHLEIGH at the KILLER editing machine

Several Roads Led Maurice Into Producing

G. to rt. DANNY MELTON, COUNTRY JOE MARSHALL, MARK RATNER, DOUG DECZER and SANDY LORING

Sabbatical Swung Wadleigh Away From Medicine to the Screen

Country Joe & Fish: Hard, Driving And Demanding

FARMER MAX

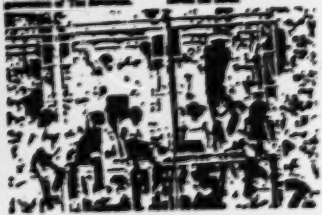
Guthrie: Six Weeks of College Were Quite Enough

BOB MASUCCI

Hendrix: "Free Form" Brings Out Reactions

ARLO GUTHRIE

JIMI HENDRIX



Here some of the people took the stage

stock

SLY

Sly: From Gospel To Social Protest For Everyone

By Jones, born Sylvester Stewart, began his singing career the same place most black performers get their start in church. From the age of four, he was a family gospel group, and the strong sense of gospel music has become a definite part of his sound today.

While still in his teens, in the mid-fifties, Sly was a top disc jockey in San Francisco. His first station, The Family Stone in 1966, after forming and disbanding groups that didn't sell him. The Family is really a family, from brother Freddie on lead guitar and sister Rose on electric piano to cousin Larry Graham, on bass, plus Jay Johnson, Jerry Martini on saxophone and Greg Errico on drums. The final lineup of seven is Cynthia Robinson on trumpet, Sly on keyboards and organ, Jay graduated from Vallejo High School and Vallejo Junior College in California, with Sly.

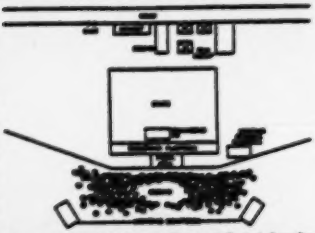
Sly has produced, composed, arranged and recorded his Epic group on the first album that The Family Stone have recorded. Many of his songs have also been recorded by other groups, a story he adds is opposed to both friends of mine, instrumental and long-haired people all ages. "My best song is the one I'm working on that time," he says. "I believe in always doing my best and then letting it all hang out."

Santana: To Make Love, Music Raw and Basic

Santana is one of those very special groups that emerged out of San Francisco, and identified with the West Coast.

Their music is difficult to categorize. The Santana band has a little bit of everything from Latin rhythms to Afro-Cuban Motown-influenced soul, to Charles Bronson being a Motown-Afro-Cuban-Latin-Soul-Rock, since two of their members are Latin American (Gary Atkins on bass, Coke Escovedo on percussion and timbales, and Mike Carabello on conga drums). The rest of the group includes Tommy Lee Lewis (Tommy Lee to him, Chris Solis of Santana fame) on keyboards, Hammond B-3 organ, Fender Rhodes piano and vocals, Michael Shrieve from Redwood City, Calif. (Hendrix, Peregrine Took and Santana) on drums, and Carlos Santana on guitar and vocals. "It's easier to make love to music and lyrics."

To help fill the Santana sound, and double many on the group, Carlos has added keyboardist Tom Coster to the band. Tom is a master of organ, piano, and electronics. His electronic debut is an explosive one.



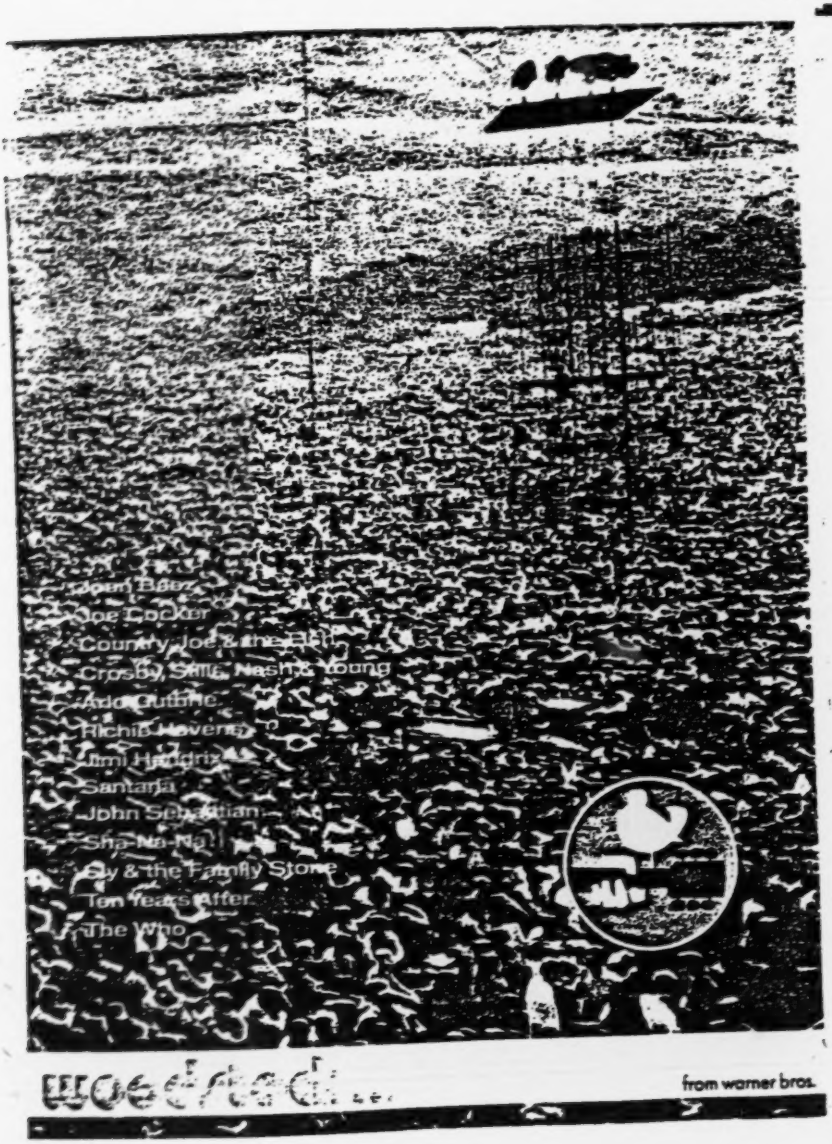
Acoustic shock of loud cues at Woodstock Festival. Acoustics often were those heard of the many Stanley Smash. Pre-mastering of group had to avoid gimmicks and static. Knowing was done at least of many distressing distances. Acoustics and loud "clanging jar" was visible inside the stage and the place where the sounds died was removed.

Flexible People and Means Made "Woodstock" Film Possible

Beyond just making an album or playing at a concert, and as a group in an all-night program, very little goes into the successful operation of the Woodstock Festival. But it might have been otherwise. It might have not to be.

For whatever might develop, there was really not nothing at Woodstock. One of the most important decisions made was to appoint three lawyers to be on-stage three brought to Bethel, N.Y., by director Mike Wadleigh and producer Bob Maurice.

Two Motel MP3 cameras, 11 Nagra portable speed cameras, six Auricon 16mm cameras, five 4.5 to 10 mm lenses, Quad eight cameras, Quad Auricon, 11 Nagra Pro sound recorders, six Nagra synchronizers, six Nagra Pro sound recorders, six 25 to 250 watt lens, one 1000w 1200w lens, an assortment of Sekon and Arriflex lenses


Joan Baez
Joe Cocker
Country Joe & the Fish
Crosby, Stills, Nash & Young
Arlo Guthrie
Richie Havens
Jimi Hendrix
Santana
John Sebastian
Sha-Na-Na
Sly & the Family Stone
Ten Years After
The Who
from warner bros.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Reheard en banc December 10, 1974

December 17, 1974.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge.*
Hon. WIN G. KNOCH, *Senior Circuit Judge.*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge.*
Hon. WALTER J. CUMMINGS, *Circuit Judge.*
Hon. WILBUR F. PELL, JR., *Circuit Judge.*
Hon. JOHN PAUL STEVENS, *Circuit Judge.*
Hon. ROBERT A. SPRECHER, *Circuit Judge.*
Hon. PHILIP W. TONE, *Circuit Judge.*

CLARA S. BRUBAKER, et al.,
Plaintiffs-Appellants,

No. 72-1898 *vs.*

BOARD OF EDUCATION, SCHOOL DISTRICT 149, COOK COUNTY, ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-971

William J. Bauer, Judge.

ORDER.

On consideration of the briefs and the arguments presented at the rehearing *en banc*, the judgment of the district court is affirmed by an equally divided vote.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 7, 1975.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge.*
Hon. WALTER J. CUMMINGS, *Circuit Judge.*
Hon. WILBUR F. PELL, JR., *Circuit Judge.*

CLARA S. BRUBAKER, et al.,
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No. 72-1898 *vs.*

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Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-971

William J. Bauer, Judge.

ORDER.

On consideration of the petition for clarification, the July 31, 1974, opinion of a panel of this Court became *functus officio* by virtue of our *en banc* order of December 17, 1974. Therefore, the decision of the district court stands as the law of the case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1176

JOHN W. BRUBAKER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CLARA BRUBAKER, AND RONALD K. SIEVERT, AN INDIVIDUAL,

Petitioners,

vs.

BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE, JAMES R. ALBERT, WALTER PAGELS, PAUL C. JONES, JR., KENNETH WILKINSON, JOHN CONDON, BEN DUNKLEY, WILLIAM H. FULLRIEDE, JOHN R. HOLLAND AND JACQUELINE MILLER, EACH INDIVIDUALLY AND AS MEMBERS OR AGENTS OF THE BOARD OF EDUCATION, SCHOOL DISTRICT NO. 149, COUNTY OF COOK, STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MITCHELL J. OVERGAARD,
134 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Respondents.

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

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JOHN W. BRUBAKER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CLARA BRUBAKER, AND RONALD K. SIEVERT, AN INDIVIDUAL,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The decision which the petitioners ask the Court to review is the affirmance of a judgment order of the District Court of the Northern District of Illinois by an equally divided vote of the Court of Appeals for the Seventh Circuit. In its Rule 19 (U. S. Sup. Ct. Rule 19) this Court has stated considerations governing review on certiorari and in paragraph 1(b) has enumerated

reasons to be considered on an application arising from a decision of a court of appeals. When the implications of a divided vote are analyzed it is readily apparent that the decision to be considered here does not fall within any of the reasons contained in the rule and that the granting of the petition is not justified.

The principal contentions made by the petitioners are that the Court of Appeals by its decision established a rule of law abolishing the First Amendment right of academic freedom (Petn. 5), ignored the dictates of the decisions of this Court (Petn. 6) and established as a rule of law a standard which combines a variety of elements which together have a devastating impact upon the right of academic freedom (Petn. 7).

In actual fact and law the decision of the Court of Appeals does nothing to establish any rules of law since the judgment is without force as a precedent. The opinions of the Court to this effect go back to *Etting* v. *The Bank of the United States,* 11 Wheat. 59 (1826) and *Durant* v. *Essex Company,* 7 Wall. 107 (1868). Justice Powell quoted from these decisions as recently as 1972 in *Neil* v. *Biggers,* 409 U. S. 188 (1972) and added (p. 192), "Nor is an affirmance by an equally divided Court entitled to precedential weight," citing to the same effect *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 264 (1960).

Perhaps the best statement of the rule as it bears on the case at bar is found in *Hertz* v. *Woodman,* 218 U. S. 205, 213 (1909):

> Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.

From the foregoing it can be seen that, contrary to the contentions of petitioners, the decision of the Court of Appeals here establishes no rules of law nor can it be considered to be ignoring the dictates of the decisions of this Court. Aside from the fact that the final decision of the Court of Appeals is without precedent and its earlier decision is *functus officio* (Petn. A. 56) the underlying opinion of the District Court was not even reported (Petn. 2), with the result that whatever precedential value it might have and whatever errors of law it might contain are not even conveniently accessible to legal researchers.

It would also seem to follow that inasmuch as the decision of the Court of Appeals here is of no authority or precedent for the determination of other cases, it is not, in the context of Rule 19, a decision in conflict with the decision of another court of appeals; it has not decided an important question of federal law which should be settled by the Supreme Court; it has not decided a federal question in conflict with decisions of this Court and has not departed from the accepted and usual course of judicial proceedings, let alone decided an important state or territorial question.

On the basis of all of the foregoing the Respondents urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MITCHELL J. OVERGAARD,
134 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Respondents.